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Evidence--When Negative Testimony Raises an Issue for the Jury (Latourelle v. New York Cent. R.R., 301 N.Y. 103 (1950))

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to alter the established doctrine.[31] Writers in legal periodicals have shared this view.[32]

The decision in the instant case squarely aligns New York courts with this latter view; and although it cannot be said that New York precedent clearly supports the ruling,[33] Justice Callahan has found ample justification for his expressed conclusion. It is his contention, adopted from the case of *Hart v. Mealy*,[34] that in its enactment of Section 355 of the New York Civil Practice Act [35] the state legislature ". . . recognized the weakness of evidence of a traffic infraction as proof of the facts which may have been involved." [36] Further, he asserts that ". . . the rule of public policy thus declared seems to go beyond the mere question of privilege or credibility of a witness." [37] Inasmuch as receipt of the certificate of conviction is tantamount to obliging a witness to testify to the prior verdict against him, the logic and force of the conclusion reached in the instant case is compelling.[38]

EVIDENCE—WHEN NEGATIVE TESTIMONY RAISES AN ISSUE FOR THE JURY.—Plaintiff's intestate was killed in a collision with a train owned and operated by defendant. Decedent stopped her car at a crossing, allowed an eastbound train to pass, and then proceeded. The car was struck by a westbound train. The crew on the west-

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[31] General Exchange Ins. Corp. v. Sherby, 165 Md. 1, 165 Atl. 809 (1933).

[32] Note, 50 YALE L. J. 499.

[33] In an action arising out of an intersection collision, judgment of conviction of the defendant for violation of an ordinance in exceeding speed limit at the time of the accident was held admissible as prima facie evidence of the facts involved. Same v. Davison, 253 App. Div. 123, 1 N. Y. S. 2d 374 (4th Dep't 1937). *But see* Merkling v. Ford Auto, 251 App. Div. 89, 96, 296 N. Y. Supp. 393, 401 (4th Dep't 1937).

[34] 287 N. Y. 39, 38 N. E. 2d 123 (1941).

[35] See note 2 *supra*.

[36] Walther v. News Syndicate Co., 276 App. Div. 169, 174, 93 N. Y. S. 2d 537, 543.

[37] *Ibid.*

[38] N. Y. VEHICLE & TRAFFIC LAW § 70, subd. 11, provides: "Upon the conviction of any person . . . of a violation of any of the provisions of this chapter or of any lawful ordinance, except a parking ordinance, made by local authorities in relation to traffic . . . the trial court or the clerk thereof shall within forty-eight hours certify the facts of the case to the commissioner, who shall record the same in his office. *Such certificate shall be presumptive evidence of the facts therein.*" (Italics supplied.) It has been urged (14 BROOKLYN L. REV. 246) that this provision of the Vehicle and Traffic Law precludes the court from ruling as it has in the instant case. However, the single provisions of a given statute must be read in their relation to the whole of the statute. [Merkling v. Ford Auto, 251 App. Div. 89, 94, 296 N. Y. Supp. 393, 399 (4th Dep't 1937).] So read, the above provision of Section 70 would seem to be applicable only in those cases where the Commissioner of Motor Vehicles is proceeding to revoke the operating license of an offending driver.

bound train testified that the warning whistle was sounded, but the crew on the eastbound testified that they heard no whistle. The trial judge dismissed the complaint on the ground that no issue of fact on the question of negligence was raised by the negative testimony, it being of doubtful sufficiency as against the direct and positive affirmative testimony. The Court of Appeals held that the issue of defendant's negligence was a jury question. *Latourelle v. New York Cent. R.R.*, 301 N. Y. 103, 92 N. E. 2d 911 (1950).[1]

Testimony to the effect that a fact would have been seen or heard had it occurred is treated by most courts as having no inherent weakness.[2] A problem of relative probative value arises, when, in the face of affirmative testimony that a fact occurred, there is testimony by others that they did not hear or see the fact.

Many factors are considered by the courts in such testimony. Some attribute little weight to a "not seen" or "not heard" as distinguished from a positive "not given," especially when it appears that the witness' attention was not directed toward the fact at the time.[3] When, however, the attention of the witness was centered upon the fact in issue, testimony that it was "not seen" or "not heard" was taken as a positive assertion that the fact had not occurred.[4] Little or no force is attached to testimony by a witness that he does not remember hearing or seeing a fact.[5] Notice is also taken of the interest of the parties in the suit,[6] their powers of observation and their attentiveness.[7] The physical position of the witness is the most important single factor to be considered in determining the weight to be accorded negative testimony. Negative testimony offered by a witness in a favorable position is often held of sufficient weight to create a jury question.[8]

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[1] The court also ruled that testimony based solely on estimates did not support the railroad's contention that decedent was guilty of contributory negligence as a matter of law.

[2] WIGMORE, EVIDENCE § 664 n. 1 (3d ed. 1940).

[3] Culhane v. N. Y. Cent. & H. R. R. R., 60 N. Y. 133 (1875). For example: (a) The signal was not given. (b) I did not see the signal given. (c) I did not hear the whistle.

[4] Fish v. Southern P. R. R., 173 Ore. 294, 143 P. 2d 917 (1944) (little significance given to choice of words).

[5] Pere Marquette Ry. v. Anderson, 29 F. 2d 479 (7th Cir. 1928) (physical position of much significance); *cf.* Wellbreck v. Long Island R. R., 31 Misc. 424, 65 N. Y. Supp. 592 (Sup. Ct. 1900).

[6] Pettit v. Pennsylvania R. R., 3 N. J. Misc. 90, 127 Atl. 173 (1925) (probative value of testimony lessened by lack of disinterest); Hartwell v. Navin, 268 App. Div. 939, 51 N. Y. S. 2d 193 (3d Dep't 1944) (probative value of testimony augmented by disinterest of witness).

[7] Henavie v. New York C. & H. R. R., 166 N. Y. 280, 59 N. E. 901 (1901).

[8] Greany v. Long Island R. R., 101 N. Y. 419, 5 N. E. 425 (1886). In Northern Pacific R. R. v. Freeman, 174 U. S. 379 (1889), an accident occurred at a highway crossing at a point where the highway crossed the railway track at nearly right angles. The Supreme Court of the United States stated: "There was testimony from several witnesses in the neighborhood tending to show that no whistle was blown by the engineer as the train ap-

In the principal case the Appellate Division, in holding that the testimony of the crew on the eastbound train failed to raise an issue of fact on the question of defendant's negligence, relied chiefly on two cases, *Foley v. N. Y. Central & H. R. R. R.*[9] and *Culhane v. N. Y. Central & H. R. R. R.*,[10] which stand for the proposition that testimony negative in character does not raise an issue, as against affirmative testimony, when it appears that the attention of the witness so testifying was not directed to the fact at the time. In the *Foley* case it appeared that the position of the witnesses was unfavorable, while in the *Culhane* case the witnesses were the parties struck by the train.

It is to be observed that the instant case is distinguishable from both the *Culhane* and *Foley* decisions. In the *Culhane* case the plaintiff's agent was the witness, while here the witnesses were disinterested parties. In the *Foley* case the witnesses were not in a favorable position, while in the principal case it appears from the evidence that the eastbound train was abreast of the westbound at the time the warning is alleged to have been sounded. The trainmen aboard the eastbound were thus in such proximity to the whistle that, in the nature of things, they probably would have heard it had it been sounded, or so a jury might have found.

It is submitted that the court, recognizing from the nature of the affirmative and negative testimony offered that reasonable minds could differ on the presence or absence of a warning signal, was correct in referring the question of defendant's negligence to a jury.

FALSE IMPRISONMENT — RESTRAINT OF MENTALLY ILL PERSONS.—At the instance of the husband, defendant psychiatrist visited the plaintiff wife. After the husband told of alleged violent threats made by the wife, which she denied, the defendant called the police. The plaintiff refused to go with the police because they had no warrant. They nevertheless overpowered her and took her to a hospital from which she was later released as sane. The police had acted upon the defendant's representation of her insanity and under his direction. Plaintiff brought suit for false imprisonment. The District of Columbia Code permits the arrest of an alleged mentally ill person without a warrant, if found in a public place; [1] or if the person

proached the crossing. There was also testimony of the conductor, engineer and fireman that the whistle was blown. As the majority of plaintiff's witnesses were so located that they would probably have heard the whistle if it had been blown, there was a conflict of testimony with respect to defendant's negligence which was properly left to a jury." *Id.* at 381.

[9] 197 N. Y. 430, 90 N. E. 1116 (1910).

[10] 60 N. Y. 133 (1875).

[1] D. C. CODE § 21-326 (1940).